



CHARTER COMMITTEE AGENDA REPORT

MEETING DATE: SEPTEMBER 16, 2013

ITEM NUMBER:

SUBJECT: PROPOSED CHARTER PROVISION

DATE: SEPTEMBER 23, 2013

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BACKGROUND

Members of the Charter Committee have suggested language to include in the proposed City of Costa Mesa Charter. Our office is tasked with providing an analysis of the proposed language. Below are the various provisions proposed following by a discussion of each provision.

Proposal 1

The city will promote fair and open competition for all City construction projects so that all contractors and workers are treated equally in the bidding and awarding of City Public Works Contracts.

Proposal 2

All citizens have the right to offer grievances or suggestions of for the betterment of municipal affairs at any regular meeting of the City Council.

Proposal 3

The City Council may reject any and all bids presented and may readvertise in its discretion.

Proposal 4

Projects for the maintenance or repair of City Assets are exempt from Public Bidding Process if the City Council determines that such work can be performed more economically by a City department than by contracting for doing such work.

Proposal 5

The City will withhold a maximum of 5% retention from public works contracts. The City reserves the right to not withhold, or reduce retention withholdings on projects it deems suitable of a non-complex nature.

Proposal 6

Neither the City Council nor any of its members shall interfere with the execution by the City CEO of his or her powers and duties. No member of the City Council shall give direct order to any subordinates of the City CEO. No member of the City Council shall attempt to influence or coerce the City CEO in the administrative service of the City. The City Council shall not appoint to a salaried position under the City government any person who is a relative by blood or marriage, nor shall any department head or other officer having appointive power appoint any relative by blood or marriage.

DISCUSSION

Proposal 1

The city will promote fair and open competition for all City construction projects so that all contractors and workers are treated equally in the bidding and awarding of City Public Works Contracts.

At the August 28th, 2013 meeting, the Charter Committee expressed strong support for the City's current procedure for awarding public contracts as authorized under the Uniform Construction Cost Accounting Act ("UCCAA"). Accordingly, language was proposed that authorizes the City to follow the UCCAA while also providing the flexibility to opt out of certain provisions if necessary. One way or the other, either through continuing to follow the general law or by adopting language in the charter that in essence follows the UCCAA, the general consensus was to continue to follow these procedures.

Assuming the Charter Committee proposes the City follow the UCCAA by way of adopting provisions that mirror the UCCAA or by adopting no new procedures, the UCCAA is structured to ensure fair and open competition. It does so by requiring publication of requests for proposals; requiring submission by way of sealed bids; unsealing the bids at the stated place, time and location; and awarding the contract to the lowest responsible bidder. In utilizing this procedure, fair and open competition is provided.

Moreover, the bid protest procedure is an additional step in ensuring fair and open competition in awarding contracts. In utilizing the bid procedure, contractors may review and contest a contract awarded that is inconsistent with the requirements of the bid request or specifications. Thus, it is our position that the safeguards are in place under the existing procedures for which the Charter Committee expressed strong support.

Finally, in the bigger picture, the definition of a charter that was presented to the Charter Committee defines a "charter" as an "instrument of limitation on the broad power of charter cities over matters of municipal affairs." In applying this definition to the proposed language, it is our opinion that Proposal 1 is already addressed in

the existing procedures.

Proposal 2

All citizens have the right to offer grievances or suggestions for the betterment of municipal affairs at any regular meeting of the City Council.

Citizens currently have the right to address the city council at any meeting on any subject that is within the council's subject matter jurisdiction. This tenet is codified in Government Code Section 54954.3(a). Moreover, members of the public are provided an opportunity to address specific items on an agenda during the public comment portion of the meeting. Thus, it is our opinion that citizens' right to offer grievances and suggestions to the City Council is currently provided for and need not be in the charter.

Proposal 3

The City Council may reject any and all bids presented and may readvertise in its discretion.

The City Council currently has the discretion to reject any bids presented and readvertise. This is codified in Public Contract Code § 20166. Since this language is consistent with the City's existing powers, it is our opinion that this language is not necessary.

Proposal 4

Projects for the maintenance or repair of City Assets are exempt from Public Bidding Process if the City Council determines that such work can be performed more economically by a City department than by contracting for doing such work.

Currently, under the UCCAA, the City is authorized to perform its own projects if the cost of the project is \$45,000 or less under Public Contract Code § 22032. Additionally, for projects in excess of \$45,000, the City Council has the discretion to authorize city employees to perform the project by force account subject to 4/5ths vote. If the Charter Committee would like different thresholds than those provided in the Public Contract Code, then it is our opinion that the above provision be modified to reflect those thresholds.

Proposal 5

The City will withhold a maximum of 5% retention from public works contracts. The City reserves the right to not withhold, or reduce retention withholdings on projects it deems suitable of a non-complex nature.

Currently, Public Contract Code § 7201 caps the amount the City may withhold until final completion of the project at 5%. The purpose of the retention is to ensure that the contractor completes all facets of the project before receiving final payment. Previously, the City was authorized to retain 10% of the total project cost. However, that amount was subsequently reduced by under state law.

There are several concerns with including this language into a charter. First, as the Charter Committee has discussed, a charter is a document of limitation. The more that is said, the greater potential there is that the City's hands will be tied in carrying out its business. Public projects come in varying sizes and complexity. Additionally, the City may have varying experiences dealing with different contractors. Thus, it is our opinion, that a 5% cap on retention would hamstring the City to act in its best interest in certain scenarios.

Proposal 6

Neither the City Council nor any of its members shall interfere with the execution by the City CEO of his or her powers and duties. No member of the City Council shall give direct order to any subordinates of the City CEO. No member of the City Council shall attempt to influence or coerce the City CEO in the administrative service of the City. The City Council shall not appoint to a salaried position under the City government any person who is a relative by blood or marriage, nor shall any department head or other officer having appointive power appoint any relative by blood or marriage.

Currently, the Charter Committee is considering firewalling as it pertains to public contracting. Proposal 6 provides a firewall between the City Council and the CEO's office in all matters. As it relates to public contracting specifically, the Charter Committee may consider a provision that requires a firewall between the City Council and the CEO's office with respect to awarding a public contract through the informal bidding procedure.

CONCLUSION

In conclusion, the Charter Committee may consider each proposal set forth above along with the analysis provided with respect to each proposal. It may approve, modify and approve or opt not to include each proposal into the draft charter.